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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOSEPH P. FERRY, PETITIONER

v.

DEPARTMENT OF THE NAVY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GEORGE J. BADEY III, ESQUIRE
1515 Locust Street
6th Floor
Philadelphia, PA 19102
546-5510

Attorney for Petitioner

QUESTIONS PRESENTED

1. Whether an employee of an agency which arbitrarily and unreasonably terminated his employment should receive attorney fees and expenses under the Equal Access to Justice Act after his appeal to the federal courts to reverse the capricious actions of the agency resulted in his reinstatement with back pay?

2. Whether an employee who made a good faith effort to comply with the agency regulations as explained to him by agency personnel should be denied attorney fees under a narrow construction of the interest of justice standard of the Back Pay Act, which Congress intended to be widely applicable?

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1. Whether an employee of an agency which arbitrarily and unreasonably terminated his employment should receive attorney fees and expenses under the Equal Access to Justice Act after his appeal to the federal courts to reverse the capricious actions of the agency resulted in his reinstatement with back pay?

2. Whether an employee who made a good faith effort to comply with the agency regulations as explained to him by agency personnel should be denied attorney fees under a narrow construction of the interest of justice standard of the Back Pay Act, which Congress intended to be widely applicable?

Joseph P. Ferry petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, No. 87-3507, affirming the denial of the petition for review by the MSPB is not reported (A. 1)[1]. The opinion of the MSPB affirming the denial of attorney fees by the Administrative Judge is unreported (A. 5). The decision of the Administative Judge denying attorney fees is unreported (A. 7). The opinion of the MSPB granting petitioner's back pay order is reported at 32 MSPR 63 (A. 21). The decision of the Administrative Judge reversing the removal decision is unreported (A. 29). The opinion of the Court of Appeals vacating

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[1] A. _____ references are to pages of the separately bound Appendix of the Petitioner.

the MSPB's removal decision is unreported, 785 F.2d 322 (A. 41). The decision of the MSRB affirming petitioner's removal is unreported, 26 MSPR 422 (A. 48).

JURISDICTION

The judgment of the Court of Appeals (A. 1) was entered on March 21, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 203 of the Equal Access to Justice Act of 1980, Pub. L. No. 96-481, 94 Stat. 2325 as revised and amended Section I of Pub. L. No. 99-80, 99 Stat. 183 (1985) and amended by Section 6103(c) of Pub. L. No. 99-509, 100 Stat. 1948 (1986), codified at 5 U.S.C. (1982 ed., Supp. IV) 504 provides in relevant part:

> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses

incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

. . .

(b)(1) For the purposes of this section --

. . .

(C) "adversary adjudication" means (i) an adjudication under Section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607), and (iii) any hearing conducted under chapter 38 of title 31;

. . .

2. Section 554 of the Act of September 6, 1966, Pub. L. No. 89-554, 80 stat. 384 as amended by Section 2(a)(1) of Pub. L. No. 95-251, 92 stat. 183 (1978), codified at 5 U.S.C. (1982 ed., supp. IV) 554 provides in relevant part:

> (a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved --
>
> (1) a matter subject to a subsequent trial of the law and the facts de novo in a court;
>
> (2) the selection or tenure of an employee, except a administrative law judge appointed under section 3105 of this title;
>
> (3) proceedings in which decisions rest solely on inspections, tests, or elections;
>
> (4) the conduct of military or foreign affairs functions;
>
> (5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

. . .

3. Sections 2 through 4 of the Back Pay Act of 1966, Pub. L. No. 89-380, 80 stat. 94, 95 as amended by section 2306 of Pub. L. No. 96-465, 94 stat. 2165 (1980) and by section 702 of Pub. L. No. 95-454, 92 Stat. 1216 (1978), codified at 5 U.S.C. (1982 ed., supp. IV) 5596 provides in relevant part:

> (a) For the purpose of this section, "agency"means --
>
> (1) an Executive agency;
>
> (2) the Administrative Office of the United States Courts;
>
> (3) the Library of Congress;
>
> (4) the Government Printing Office; and
>
> (5) the government of the District of Columbia.
>
> (b)(1) An employee of an agency who, on the basis of a timely appeal of an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under

applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee --

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect --

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title 1 of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title; and

. . .

4. Section 7701 of the Act of September 6, 1966, Pub. L. No. 89-554, 80 stat. 530 as amended by Section 2, Pub. L. No. 96-54, 92 stat. 1138 (1979), codified at 5 U.S.C. (1982 ed., supp. IV) 7701 provides in relevant part:

> (a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule or regulation. An appellant shall have the right --
>
> (1) to a hearing for which a transcript will be kept; and
>
> (2) to be represented by an attorney or other representative. Appeals shall be processed in accordance with regulations prescribed by the Board.
>
> (b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hear-

ing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision --

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any

prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

. . .

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

. . .

5. Section 205 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 stat. 1143 as amended by Section 144, Pub. L. No. 97-164, 96 stat. 45 (1982), codified at 5 U.S.C. (1982 ed., supp. IV) 7703 provides:

> (a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.
>
> (2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.
>
> (b)(1) Except as provided in paragraph (2) of the subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other pro-

vision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be --

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence; except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

6. Section 204 of the Equal Access to Justice Act of 1980, Pub. L. No. 96-481, 94 Stat. 2327, 2329, as amended by Section 2 of Pub. L. No. 99-80, 99 Stat. 184, 186 (1980), codified at 28 U.S.C. (1982 ed., supp. III) 2412 provides in relevant part:

. . .

> (b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.
>
> . . .
>
> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any

costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than .cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

. . .

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of Section 504 of Title 5, United Stated Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the Unites States was substantially justified, or that special circumstances make an award unjust.

STATEMENT

Petitioner was a civilian employee of the Department of the Navy at the Phila-

delphia Naval Shipyard, and sustained injuries in a work related accident on June 1, 1983. Subsequent to and as a direct result of this work injury, petitioner was disabled and therefore did not return to work for several months. Effective May 5, 1984, petitioner was removed for excessive unauthorized absence (AWOL) [for the period beginning July 15, 1983 and ending March 6, 1984] and for violating the agency's regulations relating to notifying the agency of his reasons for the absences.

A hearing was held on August 3, 1984 at which time the MSPB Presiding Official heard testimony and accepted evidence on both charges. At this hearing, the agency could not produce the regulation which was allegedly violated, and with respect to the AWOL charge, the record was closed before the final decision of the Depart-

ment of Labor (regarding the work disability claim) was available. Notwithstanding these issues at the hearing, the Presiding Official who heard the case for the Merit Systems Protection Board (MSPB) sustained the removal as to both charges by a decision rendered on September 20, 1984. On appeal, the MSPB sustained the removal without opinion, by decision rendered January 15, 1985. In a related case, an initial determination of the U.S. Department of Labor found that petitioner was not eligible for benefits, but in August of 1985, after a hearing, reversed its earlier decision and found that petitioner was disabled and entitled to worker's compensation benefits for the period June 1, 1983 through January 24, 1984, the time required for petitioner to recover fully from the work injury. On appeal of the MSPB removal proceeding, the Federal Circuit Court of Appeals [Ferry v.

Department of the Navy, 785 F.2d 322 (Fed. Cir. 1985) (unpublished)], vacated the decision of the MSPB and remanded the case for consideration of the effect of the Department of Labor decision and the impact of the failure of the agency to produce the regulation which petitioner was charged with violating, which regulation the agency was still unable to produce for the appeal. (A. 79-80).

Upon reconsideration at a hearing held on February 28, 1986, petitioner's penalty was mitigated. The parties stipulated that the agency would no longer consider petitioner AWOL through January 23, 1984, the date when the Department of Labor considered petitioner to be fully recovered. (A. 81-89). The issue of whether petitioner violated agency regulations was withdrawn, by stipulation of both parties. (A. 84-85). The agency proposed an eight

(8) day suspension (A. 85) and petitioner did not object, based upon reasons set forth in the testimony of petitioner, submitted by affidavit at the hearing. (A. 90-92). Petitioner was then reinstated to his job on March 28, 1986, nearly three years after his initial absence.

Thereafter, counsel for petitioner filed a timely motion seeking an award of attorney fees and expenses (A. 93-101), either under the Equal Access to Justice Act (EAJA) or for fees under the Back Pay Act (BPA). The agency filed its opposition to the petition for attorney fees. The Administrative Judge denied the motion for attorney fees in a decision rendered August 13, 1986.[2] (A. 7). The Judge decided the fees were "incurred" and that

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[2] The same Presiding Official denied this motion who had sustained the petitioner's removal. The removal decision was later vacated by the Federal Circuit Court and reversed on remand.

the petitioner was the "prevailing party". Once having cleared these hurdles though, the Judge went on to hold that attorney fees were not warranted in the "interest of justice". (A. 11-19). The Judge decided that although the petitioner had originally been charged with violating a regulation which the Agency never produced the Judge did not consider this issue in relation to attorney fees because the parties stipulated that the issue should be withdrawn from consideration.(A.84-85).

A petition for review from this Order was timely filed by the petitioner, (A. 102-111), and answered by the agency, (A. 112-121). The MSPB affirmed the Order denying attorney fees without opinion, in a 2 to 1 decision rendered July 8, 1987.

A timely petition for review was filed by the petitioner with the Court of

Appeals for the Federal Circuit. The Federal Circuit Court affirmed the MSPB opinion in a decision rendered March 21, 1988. (A. 1-4). The Federal Circuit Court agreed that petitioner was the "prevailing party" but denied fees on the grounds that it was not warranted in the "interest of justice". Specifically, the Court decided that petitioner was not substantially innocent of the charges. The Court did not address the requirements of the Equal Access to Justice Act.

Federal jurisdiction in the Circuit Court of Appeals for the Federal Circuit was based on 28 U.S.C. §1295 and 5 U.S.C. §7703 (provision for appeals to be taken from decisions of the Merit Systems Protection Board).

REASONS FOR GRANTING THE PETITION

This case presents an important conflict among the federal circuit courts over the applicability of the Equal Access to Justice Act provisions for awarding attorney fees. Some circuit decisions have held that attorney fees can not be granted in appeals from government agency proceedings. Other decisions have held that attorney fees can be recovered for proceedings against agency decisions from the initial proceedings to the final appeal. Still other circuits have decided that attorney fees may only be granted for appeals to the courts, not for proceedings before the agency. This split creates uncertainty as to the appropriate standard to be used in determining whether fees should be granted. Further complicating the matter, the standard under the EAJA has been construed by one circuit to require clearly reasonable behavior by the

government agency and by other circuits as only requiring reasonableness. Consequently, petitioners who deserve fees for their efforts in challenging arbitrary bureaucratic behavior must pay their own fees and are deterred from challenging capricious governmental behavior. Even if fees are awarded under the Back Pay Act, the petitioner is still personally responsible for expenses. Until the correct application of the EAJA attorney fees provisions is determined, potential litigants who have meritorious claims against an obstinate and entrenched bureaucracy are being deterred by the prospect of large fees and expenses which they would have to pay to vindicate themselves.

Even under the Back Pay Act, the awarding of attorney fees has been inconsistent and narrowly circumscribed.

Congress intended this act to allow employees who were wronged by an agency to have the wherewithal to challenge government actions. Instead, fees have been awarded only under certain prescribed and very limited conditions. The MSPB and the courts have been reluctant to award fees and some deserving employees have been denied fee awards. The begrudging allowance of fees only in some cases where the employee has been grossly wronged disserves the intent of Congress. Employees who must struggle against an agency which refuses to concede erroneous positions will be deterred by the difficulty of allowing a fee award. A less restrictive standard which will allow fees to be awarded to employees who prevail against arbitrary agency actions is necessary to encourage employees to assert their rights and assist in controlling a recalcitrant bureaucracy.

1. The circuit courts have interpreted the applicability of the EAJA attorney fees provisions in several different ways. The D.C. Circuit Court in Hoska v. United States Department of the Army, 694 F.2d 270(D.C. Cir. 1982) at p. 273 decided that the EAJA was not applicable to any of the proceedings in challenging the Army's actions. Although U.S.C. 28 §2412(d)(3) allows attorney fees in actions for review of an adversary adjudication,[3] 5 U.S.C. §554(a)(2) excludes from the category of adversary adjudication those matters dealing with selection or tenure. The court strictly applied this provision and allowed no recovery under the EAJA. The D.C. Circuit Court failed to consider the clear language of 28 U.S.C. §2412 (d)(3) authorizing a court to award fees and expenses "in any action for judicial review of an

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[3] Adversary adjudications are defined in 5 U.S.C. §504(b)(1)(C).

adversary adjudication" in administrative proceedings to the same extent as provided for by 5 U.S.C. §504. This bypasses the restrictions of 5 U.S.C. §554. This unduly restrictive interpretation deters employees from pursuing meritorious claims. It is contrary to the wording of the statutes and the intent of Congress.

The Federal Circuit Court has interpreted the same statutory provisions to allow recovery of fees and expenses in appeals to the courts, but not before the MSPB or in the agency appeals procedure. In Gavette v. Office of Personnel Management, 808 F.2d 1456 (Fed. Cir. 1986), at p. 1459, the Court decided that the EAJA provisions allowing recovery of fees and expenses at 28 U.S.C. §2412(d)(1) were separate and distinct from the provisions of Section 504 of 5 U.S.C. The Court reasoned that 5 U.S.C. §554 dis-

allowing fees for employee adverse adjudications dealing with tenure applied only to §504 of 5 U.S.C. Gavette, 808 F.2d at 1460. This distinction is clearly valid. 5 U.S.C. §504 refers to administrative proceedings. 28 U.S.C. §2412 applies to civil actions. These civil actions include those for judicial review of agency actions. It is important to establish the availability of fees and expenses in the courts. Those who proceed through the administrative appellate procedure should not be deterred from appealing adverse decisions. Very often an administrative body may be subtlely influenced or biased by the agency which has complaints registered against it. The courts provide a more neutral and detached forum to air the claims of employees. The Court decided that civil actions did not include appeals to the MSPB from agency decisions. Gavette, 808 F.2d at 1461.

The Court of Appeals for the Third Circuit decided to award fees under the EAJA for employee proceedings before the MSPB. Miller v. United States, 753 F.2d 270 (3rd Cir. 1985) at p. 275. The Third Circuit Court reasons that

> §2412(d)(3) states that a court reviewing an 'adversary adjudication ... shall include' in its award fees for work done before the agency "to the same extent [the agency is] authorized" to award fees under 5 U.S.C. §504(a)

Miller, 753 F.2d at 275. Thus the court could award fees under the same circumstances as the agency could in its proceedings. The restriction of civil cases is circumvented. While this interpretation greatly advances the Congressional goal of combatting arbitrary agency action, it also serves to nullify the restrictions on "adverse adjudications" (which define tenure adjudications

as not adverse adjudications once the appeal reaches the court level).[4]

It is vital to determine which level of appeals procedure the EAJA reaches. The Back Pay Act covers only attorney fees, not expenses, whereas the EAJA covers both. More importantly, the burdens are placed differently by the EAJA and BPA. Under the EAJA, the government must pay fees and expenses unless the court finds the position of the government agency substantially justified.[5] The agency must actively show that its actions were justified. Under the BPA, the employee must show that he was the prevailing party and that attorney fees are warranted in the interest of justice.[6] Thus the employee must not only prevail,

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4 5 U.S.C. §554.

5 28 U.S.C. §2412(d)(1)(A).

6 5 U.S.C. §7701(g)(1).

but must also prove that his cause is just under the BPA, whereas this is essentially assumed under the EAJA. The higher burden under the BPA will result in fewer meritorious claims being awarded fees and expenses.

The present case is an excellent example. Certain cases ruling on the availability of attorney fees require that the petitioner be substantially innocent to recover fees. Wise v. Merit Systems Protection Board, 780 F.2d 997 (Fed. Cir. 1985), Ferry v. Department of the Navy, (A. 1-4); Sterner v. Department of the Army, 711 F.2d 1563 (Fed. Cir. 1983). Other cases reason that substantial innocence is only one standard for awarding attorney fees. Yorkshire v. Merit Systems Protection Board, 746 F.2d 1454 (Fed. Cir. 1984), Hoska v. Department of the Army, 694 F.2d 270 (D.C. Cir.

1982), Keely v. Merit Systems Protection Board, 760 F.2d 246 (Fed. Cir. 1985). 5 U.S.C. §7701 allows recovery under several different justifications. If seeking to recover under substantial innocence though, the burden rests on petitioner to prove his substantial innocence of the charges brought against him (and thus the justness of his claim), and the court can apply narrow standards and find that because the petitioner has not been totally cleared of all of the charges, he is not substantially innocent. If the agency had to prove substantial justification, it could not do so. Its reliance on regulations which it could not produce and its pursuit of AWOL charges even after the decision of the Department of Labor that petitioner was validly injured and disabled show the unreasonableness of the agency's position. This follows from the decision in Olsen v.

Department of Commerce, Census Bureau, 735 F.2d 558(Fed. Cir. 1984) where an agency that did not follow its own guidelines was not substantially justified. In Brewer v. American Battle Monuments Commission, 814 F.2d 1564 (Fed. Cir. 1987), an agency which continued to press charges after they were disproved was not substantially justified. Thus, because petitioner was judged under the BPA standard rather than the EAJA standard, fees and expenses were not recovered in a situation where the agency persisted in pressing unwarranted charges.

Not only do different circuits apply the EAJA to different levels of the appeals proceedings, but the substantial justification requirement is interpreted differently. The Third Circuit Court states in Natural Resources Defense Council v. U.S.E.P.A., 703 F.2d 700 (3d

Cir. 1983), at p. 707 that the test for government actions is one of reasonableness. The reasonableness test is further elaborated in Miller v. United States, 753 F.2d 270. The government must show that it has a reasonable basis for the facts it alleges, a reasonable basis in law for the theory it propounds, and there must be a reasonable connection between the facts alleged and the legal theory advanced. Miller, 753 F.2d at 274. If the government agency's actions pass this three part test, it is substantially justified. See also, United States v. Yoffe, 775 F.2d at 450(1st Cir. 1985) (First Circuit applies reasonableness test).

A higher standard has been required by the Federal Circuit. The Court stated that substantial justification was "not simply equivalent to reasonableness."

Gavette, 808 F.2d at 1467. The Federal Circuit Court held that substantial justification required the government to show that it was clearly reasonable. Gavette, 808 F.2d at 1467. This would deter the government agency from making a claim on a weak factual and/or legal basis.

Certainly the clearly reasonable requirement more closely hews to the purpose of Congress in passing the EAJA. During floor discussions, Senator DeConcini was concerned that, "There are vast resources that enforce the arbitrary decisions of autocratic bureaucrats, but there are very few individuals or small businesses that can afford to fight back." 125 Cong. Rec. S. 10915. Because the agency has such resources at its disposal, it should be required to show more than mere reasonableness. Many arbitrary ac-

tions can be justified under a reasonableness standard. Senator DeConcini goes on to state that "If bureaucrats knew that more of their actions would be subjected to questions in court, I believe that the tendency of many bureaucrats to be careless, arbitrary, and irresponsible would cease." 125 Cong. Rec. S. 10915. This in turn depends on the fee awards. "The pervasive theme of the debate was the goal of encouraging 'little people' to challenge unreasonable actions by government bureaucrats instead of acquiescing because of the expense of legal challenge." 125 Cong. Rec. S. 10915. If the employee knew that all the agency must show is reasonableness, he will be reluctant to press his grievance. It is usually not difficult for an attorney to show that a legal theory could be accepted, or that a legal theory could possibly be applied to the facts. The

Federal Circuit Court demanded that the government show more than the "existence of a colorable legal basis for the government's case." Gavette, 808 F.2d at 1467. The existence of such a basis can be merely a pretext for harassing employees or the agency can thoughtlessly press charges on every technical violation without examining the merits of its case. The standard must be high enough to ensure that government agencies will examine the validity of their actions and only take proceedings against those employees who have actually violated the regulations.

2. Under the Back Pay Act[7], the award of attorney's fees has been inconsistent. The "interest of justice" standard has been applied unevenly and some meritorious claims of arbitrary agency action have been denied an award of fees. To further

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[7] 5 U.S.C. § 7701(g)(1).

the public policy of encouraging employees to challenge arbitrary and capricious actions, the law must be settled as to when prevailing employees can expect to receive attorney fees and costs.

The seminal case in this area is Allen v. United States Postal Service, 2 MSPB 582. After examining the hearings and debate of Congress in passing the Back Pay Act, the MSPB attempted to quantify the vague interest of justice standard by setting forth examples of when it would be violated.[8] These examples are less vague

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[8] The standard is violated: 1. Where the agency engaged in a "prohibited personnel practice." (§7701(g)(7); 2. Where the agency's action was "clearly without merit" (§7701(g)(1), or was "wholly unfounded," or the employee is "substantially innocent" of the charges brought by the agency; 3. Where the agency initiated the action against the employee in "bad faith," including: a. Where the agency's action was brought to "harass" the employee; b. Where the agency's action was brought to "exert improper pressure on the employee to act in certain ways"; 4. Where the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced" the employee; 5. Where the agency "knew or should have known that it would

than "interest of justice" but can still allow unduly prosecuted employees to slip through the requirements, especially when a court mechanistically applies the examples without taking into account the merit of the employee's claim. The standard needs to be further clarified so that those employees with just claims can be certain of recovering attorney fees for their efforts.

Although the MSPB has listed a number of justifications for recovery of attorney fees, the courts have declined to award fees in some cases if the petitioner was not substantially innocent. However, this has not been consistently followed, not even in the Federal Circuit Court itself. In Yorkshire, 746 F.2d 1454, the court examined the substantial innocence

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not prevail on the merits" when it brought the proceeding. Wise v. Merit Systems Protection Bd., 780 F.2d 997 (Fed. Cir. 1985) at 999.

requirement and the standard of whether the agency should have known it would not prevail on the merits. The court states that attorney fees are warranted if either of these conditions are applicable. Similarly, in Hoska, 694 F.2d 270, the D.C. Circuit Court awarded fees on the grounds that the agency's actions were wholly unfounded as well as the substantial innocence of the petitioner.

Conversely, the Federal Circuit Court in Wise, 780 F.2d 997, decided that the petitioner was not substantially innocent, and that any duty of the agency to investigate was mitigated by the finding that petitioner was not substantially innocent. In Sterner, 711 F.2d 1563, the court states that, ". . . petitioner's lack of substantial innocence is not controlling at the first, eligibility, stage." "However, the extent of a party's

victory is clearly relevant generally to the justice of his cause. Therefore, . . . we also hold that the de minimis nature of the victory obtained by a prevailing employee may be considered by the board under the aegis of the second, 'interest of justice', prerequisite." Sterner, 711 F.2d at 1567-1568. Here the finding of substantial innocence is made a prerequisite of recovery of attorney fees under any of the other standards. In Ferry, (A.1-4), the Federal Circuit Court first decided that petitioner was not subtantially innocent. The Court then goes on to say that, "Petitioner's various other grounds for relief sought here have been examined. In view of the foregoing, these contentions do not require discussion." Following this line of reasoning would lead to the conclusion that a petitioner would have to prove his substantial innocence to gain a fee award.

This is clearly not intended by the Congress or the MSPB's interpretation as set forth in footnote eight. The different standards for recovery of attorney fees are set out in the alternative, and are not contingent on a finding of substantial innocence. This needs to be clarified and followed to ensure that arbitrary agency actions are still deterred. In the current case, even if the petitioner is not found to be substantially innocent, agency actions which were clearly without merit, gross procedural error, or in some other way violated the interest of justice standard are still undesirable and contrary to Congress' policy and attorney fees should be granted.

The most problematic part of the MSPB guidelines is determining when a person is "substantially innocent" of the charges

brought against him. The cases dealing with "substantial innocence" reach contradictory conclusions. In Boese v. Department of the Air Force, 784 F.2d 388, (Fed. Cir., 1985) substantial innocence was found where the major defalcation charge was dismissed and the minor assault charge penalty was mitigated from removal to a 90 day suspension. Even though the charges were not wholly unfounded, Boese was cleared on testimony given. The agency had not proven its charges. Boese was substantially innocent because the agency brought charges which were not applicable to his behavior. Similarly, in the present case, the agency did not prove the charges, but an agreement was reached where the removal penalty was mitigated to an eight day suspension. The AWOL charges were dropped for the majority of the time for which they were charged and due to the fact that the agency could not produce the

regulation petitioner allegedly violated, those charges were also dropped - after almost two years (and well over 100 hours spent by counsel). Yet on the issue of attorney fees, petitioner was found to be not substantially innocent. This finding by the presiding official directly contrasts with his earlier decision reversing the removal penalty and substituting an eight day suspension. This earlier decision relies heavily on the stipulated testimony of both witnesses from the Department of the Navy and indicates that, "a substantial portion of the sustained charges has been reversed" (emphasis added). (A. 34)

Often a court will base its determination of substantial innocence on the extent of an employee's victory or the magnitude of the injustice committed by

the agency.[9] However, application of this interpretation has lead to different results. In Van Fossen v. Merit Systems Protection Bd., 788 F.2d 748 (Fed. Cir. 1986), all of the charges were upheld against the employee. However, the employee had attempted to comply with regulations as described to him. Unfortunately, the interpretation relied on was incorrect, so the regulations were violated. The Court decided to find the employee innocent. On the other hand, the petitioner in Sterner v. Department of the Army, 711 F.2d 1653, was found to be not substantially innocent of the charges brought against him. The petitioner had the penalty of removal mitigated to suspension after a number of the charges were dismissed. The Court decided that the charges dismissed were only technical

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[9] Van Fossen v. Merit Systems Protection Bd., 788 F.2d 748 (Fed. Cir. 1986) at 749.

and that the extent of the employee's success did not merit attorney fees.

In the current case, petitioner attempted to comply with the regulations as they were described to him. However, petitioner was found to have failed to comply with the regulations even though the actual regulation which he was charged with violating has never, to this day, been produced by the agency. The information he relied on from the agency was incorrect. The penalty was mitigated from removal to a stipulated eight day suspension. The extent of victory and magnitude of the injustice measures have been applied unequally and inconsistently. Guidelines to determine how these standards should be applied are needed.

The question of when an employee has made a good faith effort to comply with

the regulations is an unsettled area which needs to be delimited. Those employees who withhold information from the agency are not substantially innocent. Wise v. Merit Systems Protection Board, 780 F.2d 997 (Fed. Cir. 1985). The court states, "Such an individual brings the consequences of the agency's legal proceedings upon himself and is in no way an innocent victim who is entitled to the award of attorney fees in the interest of justice." Wise, 780 F.2d at 1000. The petitioner in Wise, 780 F.2d 997, had participated in an illegal strike and failed to return to work before the amnesty deadline. The petitioner had attempted to return to work by presenting the appropriate information to a congressman and the Department of Transportation. Although the presiding official was aware that petitioner had given information to others, the court

decided that petitioner had to present the information to the agency and the presiding official. Conversely, in Van Fossen, 788 F.2d 748, the petitioner relied on an incorrect interpretation of the regulations which was followed by agency personnel. The petitioner gave the information to the wrong person and received the authorization he needed from the wrong person. Nevertheless, it was decided that a good faith effort had been made to follow the regulations, and the petitioner was substantially innocent. In the current case, petitioner attempted to follow the regulations as described to him, but was held to be not substantially innocent because the presiding official found that he withheld evidence from the agency. The petitioner relied on the directions of different persons in the agency and those persons apparently misinterpreted the regulations. The re-

sult was that petitioner sent forms and information to the Navy and the Office of Worker's Compensation, which freely communicated with each other.

Clearly, some efforts should meet the burden of bringing vindicating evidence to the agency. When an employee follows the directions of the agency, he should not be penalized for failing to follow regulations of which the agency is knowledgable. The intent of Congress to make agencies less arbitrary is certainly not served by allowing an agency to incorrectly explain a regulation to an employee, have the employee follow the explanation, and then penalize the employee for not providing vindicating information according to the regulations. Where an employee follows the directions of the agency, the Van Fossen rule should apply, i.e., employees who make a good faith effort to comply

with the regulations should be found substantially innocent, and not be found to have intentionally refused to provide the proper forms and evidence.

Substantial innocence should be tailored to avoid the problem of an individual who violates one regulation but is innocent of the other charges. Even if the violation is major, one transgression of the regulation should not stop the recovery of attorney fees for the defense of other groundless charges blindly pursued by the agency. Under the current interpretation, if the employee is found to have violated one regulation, it is very difficult to be found substantially innocent of the charges and recover any fees. Sterner, 711 F.2d 1563, Sims v. Department of the Navy, 711 F.2d 1578. By according some weight to the actions of the employee, the court can award attorney

fees for those charges which are groundless. The public policy Congress intended to promote is served by forcing agencies to be certain all of its charges are valid. The employee who is overcharged should not have to undergo this added burden any more than the employee who is totally innocent of any charges. Sloppy agency charging procedures are as great an evil as the prosecution of innocent employees. The courts should concentrate on whether the employee's conduct was improper in all the aspects that the agency alleges.

There is disagreement among the cases as to what constitutes a groundless or meritless charge on the part of the agency. In Yorkshire v. Merit Systems Protection Bd., 746 F.2d 1454, the charges were found to be groundless because the agency proceeded with unspecific evidence

which the plaintiff countered. In Keely v. Merit Systems Protection Bd., 760 F.2d 246, the agency brought an appeal on contentions which lacked merit, according to the MSPB, because they were based on requirements not shown to be approved for use. In the current case, the agency's actions were not determined to be groundless, although the Department of Labor found that the petitioner was disabled and eligible for compensation and the agency continued to press both AWOL charges for the period of work-related disability and charges on a regulation which was never specified or produced. This tension among the cases clouds the determination of what constitutes a groundless charge. If the unspecified evidence in Yorkshire, 746 F.2d 1454 will not support a charge, the unspecified regulation in the current case should not support a charge either. Certainly an agency should have a clear

and specific basis, in the regulations and on the evidence, before it presses charges. When a regulation is so insubstantial that it cannot be produced or when evidence is so insubstantial that it will dissipate in the face of the facts, an agency which proceeds on that basis displays the arbitrariness and capriciousness which Congress has condemned. The agency should be forced to produce evidence of a substantive nature and produce the regulation alleged to be violated to avoid the groundless/meritless action restriction.

Attorney fees should be awarded when the agency knew or should have known it would not prevail on the merits. This standard has been interpreted in various ways. An initial question is how far the agency must check to determine whether it would win. In Wise, 780 F.2d 997, there

was evidence available which would have cleared the employee but which the agency did not find. The court decided that the agency had not violated a duty to investigate the evidence because the petitioner had deliberately withheld the evidence from the deciding official. This was true because the employee had attempted to go through Congressional channels rather than administrative channels. However, if exonerating evidence is presented to the agency by the employee in some fashion, the agency has a duty to investigate the evidence.[10] The area of conflict is when an agency's duty to investigate is triggered. Also, the extent of an agency's investigations which it must carry out under its own initiative needs to be determined. In the current case, the administrative judge decided that petitioner had intentionally withheld

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10 Steger v. Defense Investigative Service, Department of Defense, 717 F.2d 1402

information from the agency because he communicated with the Office of Worker's Compensation rather than with his shop. The Office of Worker's Compensation regularly disclosed information it had to the agency, however. So the agency was aware of petitioner's reasons for his absense, but through alternative channels. Under Steger v. Defense Investigative Service, Dep't of Defense, 717 F.2d 1402, the agency should have inquired further into the reasons for petitioner's absence, especially when the agency had access to the documents and conversations which explained petitioner's status. When an agency presses on with charges when it has evidence that the charges may not be valid, it is unreasonable not to investigate the evidence.

There was some dispute and confusion among agency officials over where the forms were to be filed and to whom the

petitioner was to report which was not resolved due to the failure of the agency to produce the applicable regulation. At a hearing before the Administrative Judge, John Kutschera, production superintendent of the machine shop where petitioner worked, testified that petitioner should report to him to be reassigned to light duty work while petitioner was still recovering. (A.76-78). Mr. Kutschera testified that petitioner did not have to go to the personnel office. (A. 76-77). Linda Shay, the supervisory personnel assistant in the personnel office, directly contradicted Mr. Kutschera and testified that the correct procedure was for petitioner to report to the personnel office to be assigned light duty work and thus not to the shop. (A. 74-75). Because no one could refer to a written copy of the regulation, no one could be

sure of the proper procedure.[11] This uncertainty should not negate the agency's duty to investigate whether it would win on the merits but should require an even greater agency investigation. In a similar situation in Van Fossen, 788 F.2d 748, where the employee received an authorizing memo from the wrong person because of a misinterpretation of the regulations, the employee was still vindicated by the evidence presented. In the current case, the petitioner sent requested forms to the agency and to the Office of Worker's Compensation, which regularly communicated with the agency.

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[11] Although this irreconcilible conflict existed between the versions of the only two agency witnesses, the Administrative Judge surprisingly made a finding that nevertheless, the petitioner was in violation of this "regulation", but made no finding as to which version represented the actual regulation. To this day, no evidence has been produced by the agency to resolve this glaring inconsistency.

Of these two interpretations, the Steger, 717 F.2d 1402, rationale achieves the purposes of the BPA. Congress was concerned that, "Employees whose agencies have taken unfounded actions against them may spend a considerable amount of money defending themselves against these actions, ..." Allen, 2 M.S.P.B. at p. 588. The burden should rest on the agency to investigate and ensure its actions are not groundless. If the employee must affirmatively provide evidence to the agency beyond what is required under the regulations, then the employee is expending time and money to counter the agency's accusations. Clearly, the agency has more resources at its disposal to find out facts and evidence, so it should have the burden. The bureaucracy will not be deterred from pressing meritless charges if the employee must show they are meritless. Barring active measures by an

employee to conceal information, the agency should have to investigate all its charges and insure their validity. The agency should have to examine records and evidence it knows of or has reason to suspect exists. If the agency presses ahead with charges it has not fully checked for validity, attorney fees should be granted if the charges are groundless. This effort on behalf of the agency is a small burden when compared with the needless prosecution of employees.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

BY: George J. Badey III

GEORGE J. BADEY III
1515 Locust Street, 6th Floor
Philadelphia, PA 19102
(215) 546-5510
Attorney for Petitioner

Date: JUNE 20, 1988

CERTIFICATE OF SERVICE

I, George J. Badey III, hereby certify that 40 copies of the within Petition for Certiorari and Appendix were sent by First Class U.S. Mail to the Supreme Court of the United States on June 20, 1988.

I further certify that 3 copies of the aforesaid documents were served by First Class Mail, postage prepaid on June 20, 1988 upon counsel for respondent at the address listed below.

David Cohen, Director
Department of Justice, Civil Division
Commercial Litigation Branch
Todd Building
Washington DC 20530
Counsel for Respondent

BY: George J. Badey III

GEORGE J. BADEY III
1515 Locust Street, 6th Floor
Philadelphia, PA 19102
(215) 546-5510
Attorney for Petitioner